STATE OF MICHIGAN

COURT OF APPEALS

LEAH ROSE FOSTER, Plaintiff-Appellee,	UNPUBLISHED September 15, 2009
v	No. 291825 Monroe Circuit Court Family Division
DAVID KENNETH WOLKOWITZ, Defendant-Appellant.	LC No. 08-002771-DP

Before: O'Connell, P.J., and Talbot and Stephens, JJ.

PER CURIAM.

Defendant David Wolkowitz appeals as of right an order of custody. We affirm.

Defendant first argues on appeal that the trial court committed clear legal error when it determined jurisdiction of this interstate custody dispute pursuant to the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., and not the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*. We find that although the trial court relied exclusively on the Acknowledgment of Parentage Act, it could properly exercise continuing jurisdiction pursuant to the UCCJEA. Therefore, we affirm the trial court's determination that it has jurisdiction, albeit for a different reason.

This is a question of statutory interpretation that we review de novo on appeal. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 98; 693 NW2d 170 (2005). "Whether a trial court has subject-matter jurisdiction presents a question of law that this Court reviews de novo. However, the determination whether to exercise jurisdiction under the UCCJEA [is] within the discretion of the trial court, and would not be reversed absent an abuse of that discretion." *Nash v Salter*, 280 Mich App 104, 108; 760 NW2d 612 (2008) (internal citations omitted). "Generally, an appellate court should defer to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion." *Jamil v Jahan*, 280 Mich App 92, 100; 760 NW2d 266 (2008).

"Jurisdiction deals with the power of a court to hear a class of cases or the authority of a court to bind the parties." *Omne Financial, Inc v Shacks, Inc*, 226 Mich App 397, 402; 573 NW2d 641 (1997).

> "Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending. The question of jurisdiction does not depend on the truth or falsity of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry. Jurisdiction always depends on the allegations and never upon the facts." [*Ryan v Ryan*, 260 Mich App 315, 331; 677 NW2d 899 (2004), quoting *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992).]

"Subject-matter jurisdiction cannot be conferred by consent of the parties, and a court must take notice when it lacks jurisdiction regardless of whether the parties raised the issue." *In re Complaint of Knox*, 255 Mich App 454, 457; 660 NW2d 777 (2003) (internal citations omitted). "It is beyond question that a party may attack subject matter jurisdiction at any time," and, therefore, "a proven lack of subject matter jurisdiction renders a judgment void." *In re Hatcher*, 443 Mich 426, 438; 505 NW2d 834 (1993).

"[A] court's subject matter jurisdiction is established when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous." *Id*. at 444. In this case, the Monroe Circuit Court, generally speaking, has subject-matter jurisdiction to hear a child custody dispute. *Bowie v Arder*, 441 Mich 23, 39; 490 NW2d 568 (1992). The issue in this case, then, is whether the court determined jurisdiction properly and pursuant to the appropriate statute. Defendant argues that the trial court should have decided the matter pursuant to UCCJEA, despite whether the two statutes conflict or are harmonious, because the UCCJEA governs subject-matter jurisdiction in interstate child custody actions, whereas the Acknowledgment of Parentage Act addresses only personal and general jurisdiction. Defendant further argues that under the UCCJEA, Illinois had jurisdiction. We conclude that the two statutes can be read together, and that the Michigan court had continuing jurisdiction pursuant to the UCCJEA.

The parties signed an acknowledgment of parentage affidavit pursuant to the Acknowledgment of Parentage Act soon after their daughter's birth. MCL 722.1003(1) provides, "If a child is born out of wedlock, a man is considered to be the natural father of that child if the man joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgment of parentage." As a result, "[a]n acknowledgment signed under [the Acknowledgement of Parentage Act] establishes paternity, and the acknowledgment may be the basis for court ordered child support, custody, or parenting time without further adjudication under the paternity act . . . ." MCL 722.1004.

Two provisions in the Acknowledgment of Parentage Act are key to the case at bar. First, MCL 722.1006 provides:

> After a mother and father sign an acknowledgment of parentage, *the mother has initial custody of the minor child*, without prejudice to the determination of either parent's custodial rights, *until otherwise determined by the court* or otherwise agreed upon by the parties in writing and acknowledged by the court. This grant of initial custody to the mother shall not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time. [Emphasis added.]

Second, MCL 722.1010 provides,

> [e]xcept as otherwise provided by law, a mother and father who sign an acknowledgment that is filed as prescribed by section 5 are *consenting to the general, personal jurisdiction of the courts of record of this state regarding the issues of the support, custody, and parenting time of the child*. [Emphasis added.]

Thus, in this case, plaintiff already had legal custody of the child. See *Eldred v Ziny*, 246 Mich App 142, 147; 631 NW2d 748 (2001); MCL 722.1006. Regarding defendant's rights, in a case where the defendant was a Michigan resident, this Court explained,

> the Child Custody Act [MCL 722.21 *et seq*.] is the "exclusive means" of pursuing child custody rights, whereas the Acknowledgment of Parentage Act merely establishes paternity, establishes the rights of the child, and supplies a "basis for court ordered child support, custody, or parenting time without further adjudication under the [Paternity Act, MCL 722.711 *et seq*.] . . . ." [*Id*. at 148 (internal citations omitted).]

In this case, however, defendant is a resident of Illinois, and the UCCJEA, rather than the Child Custody Act, "prescribes the powers and duties of the court in a child-custody proceeding involving this state and a proceeding or party outside of this state . . . ." *Fisher v Belcher*, 269 Mich App 247, 260; 713 NW2d 6 (2005) (internal quotations omitted). For an interstate custody dispute, MCL 722.1201 sets forth the basic jurisdictional requirement for making an initial custody determination. *Nash*, *supra* at 109. MCL 722.1201 provides:

> (1) Except as otherwise provided in [MCL 722.1204], a court of this state has jurisdiction to make *an initial child-custody determination* only in the following situation:
>
> > (a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.
> >
> > (b) A court of another state does not have jurisdiction under subdivision (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under [MCL 722.1207 or MCL 722.1208], and the court finds both of the following:
> >
> > > (*i*) The child and the child's parents, or the child and at least 1 parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.
> > >
> > > (*ii*) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

> (c) All courts having jurisdiction under subdivision (a) or (b) have declined to exercise jurisdiction on the grounds that a court of this state is the more appropriate forum to determine the custody of the child under [MCL 722.1207 or MCL 722.1208].
>
> (d) No court of another state would have jurisdiction under subdivision (a), (b), or (c).
>
> (2) *Subsection (1) is the exclusive jurisdictional basis for making a child-custody determination by a court of this state*.
>
> (3) *Physical presence of, or personal jurisdiction over, a party or a child is neither necessary nor sufficient to make a child-custody determination*. [Emphasis added.]

Pursuant to MCL 722.1102(h), an "'[i]nitial determination' means the first child-custody determination concerning a particular child." The UCCJEA further defines a "'child-custody determination'" as "a judgment, decree, or other court order providing for legal custody, physical custody, or parenting time with respect to a child. Child-custody determination includes a permanent, temporary, initial, and modification order. Child-custody determination does not include an order relating to child support or other monetary obligation of an individual." MCL 722.1102(c).

In this case, plaintiff contends that by virtue of the Acknowledgement of Parentage Act, an initial custody determination had already been made. As just noted, however, the UCCJEA defines an initial custody determination as "a judgment, decree, or other court order." However, it cannot be disputed that by operation of Michigan law, i.e., the Acknowledgment of Parentage Act, plaintiff already had initial custody. The issue, then, as defendant asserts, is whether these statutes can be read as being in harmony, or if they conflict.

Defendant first argues that the Acknowledgment of Parentage Act and the UCCJEA can be read together. Defendant asserts that MCL 722.1010 became effective on June 1, 1997; before this time, the now-replaced Uniform Child Custody Jurisdiction Act (UCCJA) governed interstate custody disputes. According to defendant, at the time, the UCCJA would have been included in the language "except otherwise provided by law," as contained in MCL 722.1010. Therefore, defendant concludes, if the issue of jurisdiction was challenged because of an interstate dispute, a child's home state would be determined under the UCCJA, which in this case, he contends, would be Illinois. We agree that the statutes can be read together, but for a different reason than the one proffered by defendant, and with a different result.

Under the UCCJA, establishing a child's home state would not be necessary if

> it is in the best interest of the child that a court of this state assume jurisdiction because the child and his parents, or the child and at least 1 contestant, have a significant connection with this state and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships. [MCL 600.653(b), repealed by 2001 PA 195.]

Thus, the UCCJA did not always require the court to find home state jurisdiction, and furthermore, the Acknowledgment of Parentage Act was the more recent statute. "[A]s a general rule, a more recently enacted statute takes precedence over an earlier one, especially if the more recent one is also more specific." *Kalamazoo v KTS Industries, Inc*, 263 Mich App 23, 34; 687 NW2d 319 (2004). Thus, defendant's argument is not persuasive.

Regardless, under the now-controlling UCCJEA, home state jurisdiction *is* the sole focus *for an initial custody determination*. *White v Harrison-White*, 280 Mich App 383, 388-389; 760 NW2d 691 (2008). The Acknowledgment of Parentage Act appears to conflict by automatically granting jurisdiction to Michigan. Thus, defendant also argues that if this Court finds that the statutes conflict, the UCCJEA should still control because it is both the more recently passed and the more specific statute. We disagree.

In interpreting statutes, a court may not legislate. *Janssen v Holland Charter Twp Zoning Bd of Appeals*, 252 Mich App 197, 200; 651 NW2d 464 (2002).

> The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision. Statutory language should be construed reasonably, keeping in mind the purpose of the statute. The first criterion in determining intent is the specific language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. However, if reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. [*White*, *supra* at 387, quoting *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389-390; 559 NW2d 98 (1996).]

"[D]ecisions from other states may guide this Court when interpreting uniform acts." *Id*.

> In certain situations,
>
> [s]tatutory language can be rendered ambiguous by its interaction with other statutes. *Statutes that relate to the same subject matter or share a common purpose are* in pari materia *and must be read together as one law*. The object of the *in pari materia* rule is to effectuate the legislative purpose as found in harmonious statutes. *If two statutes lend themselves to a construction that avoids conflict, that construction should control*. *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 147-148; 762 NW2d 192 (2009) (citations removed, emphasis added).

Finally, "'[i]t is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws,'" and, as mentioned above, "a more recently enacted statute takes precedence over an earlier one, especially if the more recent one is also more specific." *KTS Industries*, *supra* at 34, quoting *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993).

In this case, the Acknowledgment of Parentage Act and the UCCJEA can be read together as one law and, thereby, avoid a conflict. Under the Acknowledgment of Parentage Act, there has already been an initial determination of custody by operation of Michigan law. When

such a determination is given the same status as one made by a court, then where one party is out of state, the issue is whether a Michigan court can exercise continuing jurisdiction under the UCCJEA. The relevant section of UCCJEA, MCL 722.1202, provides in pertinent part:

> (1) Except as otherwise provided in [MCL 722.1204], a court of this state that has made a child-custody determination consistent with [MCL 722.1201 or MCL 722.1203] has exclusive, continuing jurisdiction over the child-custody determination until either of the following occurs:
>
> > (a) A court of this state determines that neither the child, nor the child and 1 parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships.
> >
> > (b) A court of this state or a court of another state determines that neither the child, nor a parent of the child, nor a person acting as the child's parent presently resides in this state.

Thus, "[o]nce an initial child-custody determination occurs, exclusive, continuing jurisdiction generally remains with the decreeing court." *Atchison v Atchison*, 256 Mich App 531, 538; 664 NW2d 249 (2003). Pursuant to MCL 722.1202(1)(a), then, the question whether Michigan can exercise continuing jurisdiction over a child custody determination that resulted by the operation of Michigan law is not dependent on whether Michigan is the home state, but whether the child or a party has a significant connection to Michigan.

"The phrase 'significant connection' is not defined in the UCCJEA." *White*, *supra* at 390. However, in *White*, this Court determined,

> [T]he significant connection that permits exercise of exclusive, continuing jurisdiction under MCL 722.1202(1)(a) exists where one parent resides in the state, maintains a meaningful relationship with the child, and, in maintaining the relationship, exercises parenting time in the state. Our interpretation of the phrase "significant connection" comports with that of a majority of jurisdictions, the plain and ordinary meaning of the phrase, and the overarching purpose of the UCCJEA to prevent jurisdictional disputes by granting exclusive, continuing jurisdiction to the state that entered the initial custody decree, so long as the relationship between the child and the parent residing in the state does not become so attenuated that the requisite significant connection no longer exists. [*Id*. at 394.]

Among the factors that the *White* Court considered was that the "[d]efendant submitted to the jurisdiction of the Michigan courts at the time of the divorce judgment and subsequent custody rulings." *Id.* at 395. In fact, the *White* Court cited *Fish v Fish*, 596 SE2d 654 (Ga App, 2004), for this proposition, explaining that in that case, "the Georgia Court of Appeals found a significant connection where the father lived in Georgia, visitation occurred in Georgia, the children spent Spring Break and the month of July in Georgia, and the parties agreed to jurisdiction in Georgia." *Id*. at 393, citing *Fish*, *supra* at 656.

In this case, the parties' daughter was born in Michigan and spent six-and-a-half months in the state after her birth, until she moved to Illinois with her parents at the very end of April 2007. Over the course of the year that the child and plaintiff (who had legal custody) spent in Illinois, they routinely visited Michigan, where all plaintiff's family is located. In that sense, then, plaintiff could be said to have "exercised parenting time" in Michigan. Moreover, the visits were often a week long, and on one occasion, plaintiff and her daughter stayed in Michigan for an entire month. At the time plaintiff initiated the child custody proceedings, she had been back in Monroe, Michigan, for about five days.

Therefore, plaintiff and her child still had a significant connection to Michigan, and the Monroe Circuit Court had jurisdiction to modify the initial custody determination that existed by operation of Michigan law. MCL 722.1202(1)(a). Although the trial court relied exclusively on the Acknowledgment of Parentage Act when finding that defendant consented to jurisdiction in Michigan, we "will not reverse a trial court if it reached the right result for an alternative reason." *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 668; 760 NW2d 565 (2008). Finally, because we find that Michigan has continuing jurisdiction, it is not necessary to consider defendant's argument that Illinois is the home state.

Next, defendant claims that applying the Acknowledgment of Parentage Act to unmarried fathers while applying the UCCJEA to married fathers violates the equal protection clauses of the state and federal constitutions. We disagree.

"Whether [a statute] violates the state or the federal equal protection clauses [Const 1963, art 1, § 2; US Const Am XIV], which are coextensive, presents a question of law that this Court reviews de novo." *Heidelberg Bldg, LLC v Dep't of Treasury*, 270 Mich App 12, 17; 714 NW2d 664 (2006).

> "The essence of the Equal Protection Clauses is that the government not treat persons differently on account of certain, largely innate, characteristics that do not justify disparate treatment. Conversely, the Equal Protection Clauses do not prohibit disparate treatment with respect to individuals on account of other, presumably more genuinely differentiating, characteristics. Moreover, even where the Equal Protection Clauses are implicated, they do not go so far as to prohibit the state from distinguishing between persons, but merely require that 'the distinctions that are made not be arbitrary or invidious.'" [*Heidelberg, supra* at 17-18, quoting *Avery v Midland Co, Texas*, 390 US 474, 484; 88 S Ct 1114; 20 L Ed 2d 45 (1968) (internal citations omitted)].

Finally, "[t]he equal protection guarantee contained in both our federal and state constitutions requires that persons under similar circumstances be treated alike. However, it does not require that persons under different circumstances be treated the same." *In re AH*, 245 Mich App 77, 82; 627 NW2d 33 (2001).

"Different review standards apply to different kinds of cases. A rational basis standard is used for the review of most legislation, meaning that 'a statute will not be struck down if the classification scheme it creates is rationally related to a legitimate governmental purpose.'" *American States Ins Co v Dep't of Treasury*, 220 Mich App 586, 592; 560 NW2d 644 (1996), quoting *Doe v Dep't of Social Services*, 439 Mich 650, 662; 487 NW2d 166 (1992). In addition,

> "[t]he United States Supreme Court has recognized an intermediate level of review, . . . under which a challenged statutory classification will be upheld only if it is 'substantially related to an important governmental objective.' This 'heightened scrutiny' standard has been applied to legislation creating classifications on such bases as illegitimacy and gender.'" [*Crego v Coleman*, 463 Mich 248, 260; 615 NW2d 218 (2000), quoting *Clark v Jeter*, 486 US 456, 461; 108 S Ct 1910; 100 L Ed 2d 465 (1988).]

But in *American States Insurance Company*, this Court also noted,

> On the other hand,
>
> > in two situations the equal protection guarantee is less tolerant of legislation that creates a classification scheme—when the classification is based upon suspect factors (such as race, national origin, or ethnicity), or when the legislation that creates the classification impinges upon the exercise of a fundamental right. [*Doe v Dep't of Social Services*, 439 Mich 650, 662; 487 NW2d 166 (1992).]
>
> If a suspect class is being treated differentially by a statute or if the statute impinges upon the exercise of a fundamental right, "strict scrutiny" is applied, and the statute will be upheld only if its classification scheme has been precisely tailored to serve a compelling governmental interest. [*American States Ins Co*, *supra* at 592-593.]

"'In determining whether . . . a particular right is deserving of strict scrutiny . . . , we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein.'" *Id*. at 594, quoting *Plyler v Doe*, 457 US 202, 217 n 15; 102 S Ct 2382; 72 L Ed 2d 786 (1982) (internal citations omitted). "A parent's interest in the custody of her child and in the parent-child relationship is a fundamental right." *In re AH*, *supra* at 83. Therefore, the Acknowledgment of Parentage Act, which addresses an unmarried father's relationship with his child, should be reviewed under strict scrutiny.

"Regardless of the level of scrutiny employed, an equal protection challenge requires us to make two findings: the governmental purpose behind the legislative enactment, and how closely related the law is to that purpose." *Crego*, *supra* at 269. It is true that the acknowledgment of paternity pursuant to MCL 722.1003 "does not afford the father the same legal rights as a father whose child is born within a marriage, but rather, . . . merely entitles the parties to seek custody, support, or parenting time without the need to first obtain an order of filiation under the Paternity Act, MCL 722.711 *et seq*." *Eldred*, *supra* at 148-149. However,

> [t]he Legislature was clearly expressing a public policy position favoring legal protection of a child born out of wedlock, pursuant to which a mother and a man jointly executing an acknowledgment of parentage would be legally recognized as the child's parents without litigation, thereby allowing the parties to seek and the court to enter custody, parenting time, and support orders. [*Sinicropi v Mazurek*, 273 Mich App 149, 158; 729 NW2d 256 (2006).]

Thus, the purpose of the Acknowledgment of Parentage Act is to afford the child the full rights of a child born in wedlock. *Eldred*, *supra* at 149.

The Legislature has a compelling interest to establish parentage and ensure that a child born out of wedlock has the same rights as a child of marriage. Although the Acknowledgment of Parentage Act does not bestow rights on an unmarried father equal to those of a married father, the statute allows an unmarried father to establish paternity without going through the Paternity Act and entitles him to the right to seek a custody determination, a right that a married father already has. Thus, the statute provides an avenue for an unmarried father to obtain equal rights. Furthermore, the law is narrowly tailored by virtue of the fact that although initial custody, and hence jurisdiction, is given to the Michigan courts, when an out-of-state party is involved, the court must determine pursuant to the UCCJEA whether Michigan can continue to exercise jurisdiction. In this case, there was no equal protection violation as applied to defendant because it was proper for the court to exercise continuing jurisdiction since plaintiff and her daughter still had substantial connection to the state.

Finally, defendant argues that he was entitled to an award of fees and costs, pursuant to the UCCJEA. We disagree. Again, statutory interpretation raises a question of law subject to de novo consideration on appeal. *Polkton Twp*, *supra* at 98. MCL 722.1311(1) provides,

> [t]he court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney fees, investigative fees, witness expenses, travel expenses, and child care expenses during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

In construing statutes, "the term 'shall' is clearly mandatory." *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008). Therefore, the statute plainly states that fees and costs are awarded to the prevailing party, which, in this case, is plaintiff. Defendant argues that he should receive fees and costs because plaintiff lied and has perpetuated a fraudulent action. Even if defendant's arguments had merit, the statute simply permits a party from whom fees are sought to show that such an award would be "clearly inappropriate;" the statute does not provide that the losing party is entitled to such fees. At any rate, defendant has made no such showing of inappropriateness. Plaintiff denies that she lied about signing the affidavit of parentage; rather, she claims that she forgot that she signed it. Moreover, the existence of the affidavit helps, rather than hurts, her case for jurisdiction in Michigan. In addition, the affidavit of parentage gave plaintiff initial custody of the child pursuant to Michigan law and, therefore, filing suit in Michigan was not a "fraudulent action." Plaintiff is not required to pay defendant's attorney fees and costs.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens